PART VII

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

B. EXISTENCE OF PNEUMOCONIOSIS

5. SECTION 718.202(a)(4): MEDICAL REPORTS

Under Section 718.202(a)(4), the administrative law judge must discuss and weigh all relevant medical evidence to ascertain whether claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Furthermore, subsection (a)(4) provides that the physician must advise whether the miner has or had pneumoconiosis as defined in Section 718.201, *i.e.*, a chronic dust disease arising out of coal mine employment. *See* ***Perry v. Director, OWCP***, 9 BLR 1-1 (1986); *see also* ***Stomps v. Director, OWCP***, 816 F.2d 1533, 1535, 10 BLR 2-107, 2-108 (11th Cir. 1987).

CASE LISTINGS

DIGESTS

Pursuant to Section 718.202(a)(4), the administrative law judge may properly assign more probative value to a physician's report which is more definitive on the absence of any relationship between claimant's respiratory impairment and coal mine employment. ***Perry v. Director, OWCP***, 9 BLR 1-1 (1986).

Pursuant to 20 C.F.R. Section 718.202(a)(4), the administrative law judge must discuss and weigh all relevant medical evidence to ascertain whether claimant has established the presence of pneumoconiosis by a preponderance of the evidence. ***Perry v. Director, OWCP***, 9 BLR 1-1 (1986).

The Board interpreted the clause "notwithstanding a negative x-ray" in Section 718.202(a)(4) to mean that *even if* there is a negative x-ray, the doctor's report may establish pneumoconiosis under subsection (a)(4). There is no requirement that a negative x-ray report be in the record. ***Taylor v. Director, OWCP***, 9 BLR 1-22 (1986).

Where physicians provide conflicting opinions as to the etiology of the miner's impairment, the administrative law judge should have discussed the conflicting evidence and provided a rationale for choosing one opinion over the other. ***McGinnis v.***

Freeman United Coal Mining Co., 10 BLR 1-4 (1987); ***Calfee v. Director, OWCP***, 8 BLR 1-7 (1985).

In determining whether statutory pneumoconiosis is established, the administrative law judge must determine whether a medical opinion establishes that the miner's pulmonary disease is significantly related to or substantially aggravated by dust exposure in claimant's coal mine employment. ***Wilburn v. Director, OWCP***, 11 BLR 1-135 (1988).

The existence of pneumoconiosis may be established on the basis of a physician's opinion that the miner suffers from pneumoconiosis as defined in Section 718.201. *See* ***Nance v. Benefits Review Board***, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988).

The administrative law judge reasonably credited the opinion of the treating physician over that of a reviewing physician at Section 718.202(a)(4). ***McClendon v. Drummond Coal Co.***, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988).

"In part" is sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). ***McClendon v. Drummond Coal Co.***, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988); ***Stomps v. Director, OWCP***, 816 F.2d 1533, 10 BLR 2-107 (11th Cir. 1987).

Since cor pulmonale is a recognized sequela of pneumoconiosis, a diagnosis of cor pulmonale may be indicative of the existence of pneumoconiosis. ***Christian v. Monsanto Corp.***, 12 BLR 1-56 (1988).

An x-ray report, in and of itself, does not qualify as a medical report under Section 718.202(a)(4). ***Anderson v. Valley Camp of Utah, Inc.***, 12 BLR 1-111 (1989).

The determination that claimant has established the existence of pneumoconiosis at Section 718.202(a)(4) shall be supported by a reasoned medical opinion. 20 C.F.R. §718.202(a)(4). ***Anderson v. Valley Camp of Utah, Inc.***, 12 BLR 1-111 (1989); *see generally* ***Taylor v. Director, OWCP***, 9 BLR 1-22 (1986).

The Board held that the holdings in ***Fields v. Island Creek Coal Co.***, 10 BLR 1-19 (1987) and ***Shedlock v. Bethlehem Mines Corp.***, 9 BLR 1-195 (1986), requiring the weighing of all contrary probative evidence, are not applicable to establishing the existence of pneumoconiosis under Section 718.202(a) and thus, affirmed the administrative law judge's finding of the existence of pneumoconiosis under Section 718.202(a)(4) based upon his weighing of only the medical opinions of record. ***Beatty v. Danri Corp.***, 16 BLR 1-11 (1991).

Before finding the medical reports of record sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge must determine if the reports are reasoned and documented and resolve any inconsistencies between

claimant's smoking history as reflected in the medical reports and in claimant's hearing testimony. ***Trumbo v. Reading Anthracite Co.***, 17 BLR 1-85 (1993).

At Section 718.202(a)(4), the administrative law judge is not required to defer to the physicians with superior qualifications. The administrative law judge did not err in crediting a physician's report which was based in part on a positive x-ray, even though the weight of the x-ray evidence was negative for pneumoconiosis. ***Trumbo v. Reading Anthracite Co.***, 17 BLR 1-85 (1993).

Under the facts of this case, in determining whether the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), the administrative law judge did not err in failing to weigh evidence relevant to a determination of "clinical" pneumoconiosis together with evidence relevant to a determination of "legal" pneumoconiosis. Legal pneumoconiosis, as defined in 20 C.F.R. §718.201, is a broader category which is not dependent upon a determination of clinical pneumoconiosis, and the absence of clinical pneumoconiosis does not necessarily influence a physician's diagnosis of legal pneumoconiosis. ***Jones v. Badger Coal Co.***, 21 BLR 1-102 (1998)(*en banc*).

The aggravation of a pulmonary condition by dust exposure in coal mine employment must be significant and permanent in order to constitute "legal" pneumoconiosis as defined at 20 C.F.R. §718.201. Thus, medical opinions which diagnose only a temporary worsening of pulmonary symptoms upon exposure to coal dust, but no permanent effect, cannot support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4). ***Henley v. Cowan & Co., Inc.***, 21 BLR 1-147 (1999).

The Fourth Circuit recognized that Section 718.201 encompasses a wide variety of conditions; including diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nonetheless been made worse by coal dust exposure. The Fourth Circuit held that the plain language of Section 718.201 demands that these diseases result in some sort of respiratory or pulmonary impairment before they can be considered "pneumoconiosis." ***Clinchfield Coal Co. v. Fuller***, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999).

However, the Fourth Circuit noted that Section 718.201 also includes diseases that are or can be caused by coal dust inhalation. Any "chronic dust disease of the lung and its sequelae...arising out of coal mine employment" will qualify. Examples include "coal workers' pneumoconiosis" and "anthracosis." The Fourth Circuit noted that Section 718.201 nowhere requires these coal dust-specific diseases to attain the status of an "impairment" to be classified as "pneumoconiosis." The Fourth Circuit held that the definition is satisfied whenever one of these diseases is present in the miner at a detectable level; whether the particular disease exists to such an extent as to be compensable is a separate question. ***Clinchfield Coal Co. v. Fuller***, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999).

The Sixth Circuit held that the Director, as a respondent, has authority to file a pro-petitioner brief, and thus denied employer's motion to strike the Director's brief. At 20 C.F.R. §718.202(a)(4), the court held that substantial evidence did not support the ALJ's finding that two physicians' opinions diagnosing pneumoconiosis were merely restatements of positive x-rays. The court also held that the ALJ erred in discounting these reports because the physicians opined that claimant's obstructive defect could have been caused by either smoking or coal dust exposure. The court reasoned that both physicians were nevertheless unequivocal that coal dust exposure aggravated claimant's pulmonary problems, thus expressing opinions supportive of a finding of legal pneumoconiosis. The court further held that the ALJ did not consider whether employer's physicians were using the more restrictive medical definition of pneumoconiosis when they opined that claimant's respiratory problems were related to his smoking only. In this regard, the court noted that only Dr. Fino discussed his rationale for excluding coal dust exposure as an aggravating factor; the court noted that Dr. Fino's apparent requirement that fibrosis be present for a diagnosis of simple coal workers' pneumoconiosis, is not a requirement for a finding of legal pneumoconiosis. At 20 C.F.R. §718.204(c)(4), the court held that the ALJ erred when he gave little weight to Dr. Vaezy's finding of total disability because the physician relied, in part, on a non-qualifying pulmonary function study. The court also held that the ALJ erred in failing to compare Dr. Baker's diagnosis of a mild impairment with the exertional requirements of claimant's usual coal mine employment. The court added that the ALJ improperly credited medical opinions that claimant is not totally disabled, without considering whether the rendering physicians had any knowledge of the exertional requirements of claimant's usual coal mine work. The court vacated the Board's decision affirming the ALJ's denial of benefits, and remanded the case to the ALJ. ***Cornett v. Benham Coal, Inc.***, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(a)(2), which expands the definition of pneumoconiosis to include both chronic restrictive or obstructive pulmonary disease arising out of coal mine employment, is not "impermissibly retroactive," and, therefore, may be applied to all claims pending on January 19, 2001. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 862, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(c), stating that pneumoconiosis is recognized as a latent and progressive disease, is not "impermissibly retroactive," and, therefore, may be applied to all claims pending on January 19, 2001. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 863, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(c), setting forth the definition of pneumoconiosis, should be narrowly construed to state that pneumoconiosis *can* be a progressive and latent disease, not that it is always, or typically, a latent or progressive disease. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 869, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The Sixth Circuit held that the administrative law judge's explanations for crediting the opinions of Drs. Broudy and Fino and discounting the contrary opinion of Dr. Rasmussen, to find the medical opinions insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), were not supported by substantial evidence. The administrative law judge credited the opinions of Drs. Broudy and Fino over the contrary opinion of Dr. Rasmussen because he found that Dr. Rasmussen relied on an incomplete medical record in that he diagnosed only clinical pneumoconiosis by x-ray, whereas Drs. Broudy and Fino relied on comprehensive documentation in reaching their conclusions that claimant did not have pneumoconiosis. The administrative law judge also found that Dr. Fino had excellent professional qualifications. The Sixth Circuit held that the administrative law judge did not adequately explain his finding that Dr. Rasmussen's report did not support a finding of legal pneumoconiosis, where the record showed that Dr. Rasmussen relied on the results of his exercise blood gas study and diffusing capacity test to determine that claimant was suffering from a pulmonary disability. The Sixth Circuit also held that the Board's explanation that Dr. Rasmussen diagnosed clinical but not legal pneumoconiosis, was inaccurate as a matter of law because (1) Dr. Rasmussen's consideration of evidence, other than the x-ray, including a physical exam, diffusing capacity test, arterial blood gas studies, and claimant's personal and occupational histories, would have been sufficient alone to support a finding of legal pneumoconiosis; and because (2) even if Dr. Rasmussen diagnosed only clinical pneumoconiosis, as the Board concluded, such a diagnosis was necessarily legal pneumoconiosis where legal pneumoconiosis includes clinical pneumoconiosis. ***Martin v. Ligon Preparation Co.***, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

The Sixth Circuit held that the administrative law judge did not adequately explain his reasons for crediting the opinions of Drs. Broudy and Fino. The Sixth Circuit found "no rational explanation" for the administrative law judge's determination that Dr. Broudy's opinion was more credible than Dr. Rasmussen's opinion regarding the existence of pneumoconiosis, especially after the administrative law judge found that Dr. Broudy's report contained little rationale or explanation and that Dr. Rasmussen's report was well-reasoned. The Sixth Circuit noted, moreover, that what explanation Dr. Broudy did provide for his opinion that claimant did not have pneumoconiosis, directly supported Dr. Rasmussen's finding of pneumoconiosis based on the blood gas study results. With regard to Dr. Fino, the Sixth Circuit held that Dr. Fino's credentials were not necessarily superior to those of Dr. Rasmussen, where Dr. Fino was Board-certified in Internal Medicine and Pulmonary Disease and Dr. Rasmussen was Board-certified in Internal

Medicine only but had extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis. The Sixth Circuit also determined that the record refuted the administrative law judge's finding that Dr. Fino reviewed Dr. Rasmussen's exercise blood gas study and diffusing capacity test results and had determined that they were not indicative of pneumoconiosis. The Sixth Circuit thus vacated the Board's decision affirming the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) and the denial of benefits, and remanded the case to the administrative law judge for further consideration. ***Martin v. Ligon Preparation Co.***, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

The Seventh Circuit, on the merits of the claim, held that the administrative law judge did not err in relying of the weight of the medical opinion evidence at 20 C.F.R. §718.202(a)(4) to find the existence of pneumoconiosis established, where the weight of the x-ray evidence at 20 C.F.R. §718.202(a)(1) was negative. The Seventh Circuit also held, at 20 C.F.R. §718.202(a)(4), that the administrative law judge permissibly gave less weight to Dr. Selby's opinion, that claimant's worsening lung function could not be due to coal dust exposure because he was no longer working in or around coal mines, based on the court's holding that it conflicted with the regulatory provision at 20 C.F.R. §718.201(c) that pneumoconiosis can be latent and progressive. The Seventh Circuit also determined that Dr. Selby's statements, that coal mine employment "helped preserve [claimant's] lung function" and had a "positive effect on his health," were "contrary to the congressional findings and purpose central to the [Act]." ***Roberts & Schaefer Co. v. Director, OWCP [Williams]***, 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005).

The Fourth Circuit upheld the administrative law judge's reliance on Dr. Parker's well-reasoned medical report to support a finding of totally disabling pneumoconiosis, despite the physician's failure to apportion the miner's lung impairment between smoking and coal dust exposure. ***Consolidation Coal Co. v. Williams***, 453 F.3d 609, BLR (4th Cir. 2006).

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